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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1970

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NO. 47

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JOSEPH CHARLES USNER

Petitioner

versus

LUCKENBACH OVERSEAS CORPORATION and ISTHMIAN LINES, INC.

Respondent

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## APPLICATION FOR RE-HEARING

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APPLICATION FOR REHEARING

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## PETITION FOR RE-HEARING

Petitioner, Joseph Charles Usner, presents this petition for a re-hearing of the above entitled cause and in support, thereof, respectfully shows:

I.

The majority opinion is erroneous in holding that an isolated personal act of negligence by a fellow longshoreman which resulted in injury to the petitioner did not render the ship owner liable due to the unseaworthiness of its vessel.

II.

The majority opinion is erroneous in holding in effect that the unseaworthiness of a vessel must be caused by the ship's condition, appurtenances, cargo or crew.

III.

The majority opinion is erroneous in not holding that although there is a "complete divorcement of unseaworthiness liability from concepts of negligence" that operational negligence is one sturdy type of unseaworthiness.

IV.

The majority opinion is erroneous in misinterpreting *Mascuilli vs United States*, 387 U. S. 237.

V.

The majority opinion is erroneous in not following this Court's clear and positive prior decisions which are apposite and controlling here.

## ARGUMENT

The majority opinion, with Mr. Justice Stewart as the organ of the Court, is a feeble attempt to subvert the fundamental principle of the unseaworthiness doctrine which has been painstakingly enunciated by this Court over the years. In the opinion, Mr. Justice Stewart seems obsessed with the idea that the Court has repeatedly taken pains to point out that liability based upon unseaworthiness is wholly distinct from liability based upon negligence. No one quarrels with this, but it is a well-recognized principle that must be accepted, that unseaworthiness can and does result with or without negligence.

The majority opinion states on page 6, "What has evolved in our case law, we said, is the 'complete divorcement of unseaworthiness liability from concepts of negligence'. 362 U. S. 550." Again we say, this does not subtract from the universally recognized concept that unseaworthiness may be caused by acts of operational negligence. Negligence, if found, does not negate unseaworthiness but may be the very act by which the "condition" of unseaworthiness results. Almost every condition of unseaworthiness may be traced to an act of negligence.

This Court has held that operational negligence makes a ship unseaworthy in the following:

In *Mahnich*, the choosing of rotten rope instead of available good rope, was an isolated negligent act which created an unseaworthy condition.

In *Crumady*, the setting of the cutoff device on the winches incorrectly, was an isolated act of negligence which created a condition of unseaworthiness.

In *Gutierrez*, with Mr. Justice White as the organ of the Court, the method of loading cargo, or the negligent manner of its storage, was the negligent act which created a condition of unseaworthiness.

And in *Mascuilli*, the misuse of otherwise seaworthy equipment was an isolated negligent act which created a condition of unseaworthiness.

These cases are no different from the case at bar, in that each involved a so-called isolated act of negligence which resulted in an unsafe place in which to work —

or an unseaworthy condition which was the source of injury to a Sieracki seaman. In those cases, the Court did not concern itself with measuring the lapse of time between the negligent act and the occurrence of the injury or manner in which the condition of unseaworthiness was created. It was of no moment that the unseaworthiness was due to operational negligence or to some other conventional type of unseaworthiness. This Court did not resort to splitting hairs and measuring time lapses between act and condition. Where the condition was found to exist, the ship owner was held absolutely liable.

The majority opinion on page 6 states that petitioner's injuries were not caused by ". . . the condition of the ship, her appurtenances, her cargo or her crew, but the isolated, personal, negligent act of the petitioner's fellow longshoreman." Never has this Court limited the scope of unseaworthiness to that of, "the condition of the ship, her appurtenances, her cargo or her crew". The majority recognized this on page 6 when it cited as authority for the non-limitation doctrine, *Mahnich*, *Sieracki*, *Boudoin*, *Waldron* and *Gutierrez*.

Prior to the majority opinion in the case at bar, this Court has never held that an unseaworthy condition could not be caused by the, "isolated, personal negligent act of the petitioner's fellow longshoreman", (or fellow seaman). In all of its prior decisions, this Court has held that isolated acts of operational negligence make a ship unseaworthy. See *Mahnich*, *Crumady*, *Gutierrez*, and *Mascuilli*.

The majority opinion further stated and we quote, "To hold that this individual act of negligence (the isolated, personal act of negligence of the petitioner's

fellow longshoreman), rendered the ship unseaworthy would be to subvert the fundamental distinction between unseaworthiness and negligence that we have so painstakingly and repeatedly emphasized in our decisions."

In no way would the holding that an individual act of negligence renders a ship unseaworthy subvert the fundamental distinction between unseaworthiness and negligence. In fact, to hold otherwise is to ignore prior decisions of this Court to the effect that isolated, personal negligent acts may very well bring about a condition of unseaworthiness.

The majority opinion stated on page 6 and 7, "In *Trawler Racer*, supra, there existed a condition of unseaworthiness, and we held it was error to require a finding of negligent conduct in order to hold the ship owner liable". In *Trawler Racer*, the condition of unseaworthiness was the fish curry spilled upon the ship's railing, which spilling was caused by the actions of individuals. The *Trawler Racer* Court was correct in holding that it was error to require a finding of negligent conduct in order to hold the ship owner liable. It would also have been error for the Court to have found that the negligent conduct did not bring about the unseaworthy condition.

The majority opinion stated on page 5, "More specifically, the Court has repeatedly taken pains to point out that liability based upon unseaworthiness is wholly distinct from liability based upon negligence. The reason, of course, is that unseaworthiness is a *condition*, and how that condition comes into being — whether by negligence or otherwise — is quite irrelevant to the owner's liability

for personal injuries resulting from it". The above is a correct statement of the law as enunciated by this Court in its prior decisions, yet the majority opinion, while pronouncing a correct statement of the law, proceeded to an incorrect application.

The majority opinion continues on page 7, "The case before us presents the other side of the same coin. For it would be equally erroneous here, where no condition of unseaworthiness existed, to hold the ship owner liable for a third party's single and wholly unforeseeable act of negligence".

The other side of the same coin is the same. In the instant case, there did exist a condition of unseaworthiness — transitory, temporary or instantaneous, though it may have been — just as the spilling of the fish curry on the rail in the *Trawler Racer* the negligence of choosing a rotten rope in *Mahnich*, the negligent act of setting the cut off device on the winches incorrectly in *Crumady*, the negligent method of loading cargo in *Gutierrez*, the negligent operation of a seaworthy winch in *Mascuilli*, all of which make for an unseaworthy condition. The unseaworthy condition here was caused by the negligent "Sieracki Seaman" in negligently lowering the sling which struck petitioner. If the sling had broken, there would have been no problem in finding the ship to have been unseaworthy. There should, therefore, be no problem in finding the ship to be in an unseaworthy condition due to the negligent action of a third party. It is irrelevant as to how the condition of unseaworthiness came into being.

The majority's attempt to place *Usner* on the other side of the same coin and hold that operational negligence

does not in itself bring about a condition of unseaworthiness in effect destroys the coin itself. At least it destroys what has heretofore been recognized as ". . . one sturdy type of unseaworthiness" — that which is caused by operational negligence. This was pointed out by Mr. Justice Douglas in his dissent at page 3.

As the dissenting opinion of Mr. Justice Harlan correctly states, *Crumady* cannot be distinguished from *Usner*. The issue in *Usner* was decided in *Crumady*. *Mascuilli* was a restatement of *Crumady*, and for that reason *Crumady* was cited in support of the Per Curiam opinion in *Mascuilli*. In the wake of *Usner*, frustration, confusion, uncertainty and inequities will result and private rights will be lost. Because of the conflict in the Circuits, it was hoped that *Usner* would be a beacon and light the way, and that a course would be charted by this Court, for the Circuits to follow, but the majority did not address itself to the issue at hand — act and condition. Where does act begin and end; where does condition begin? Can they occur simultaneously and under what circumstances? As the writ was granted because of the conflict in the Circuits, it is submitted that the opinion should have addressed itself to the issue. If as the majority says the first question presented in *Mascuilli* was answered affirmatively then the confusion in the Circuits which existed over the issue of operational negligence has not been resolved in *Usner*. *Usner* it appears in the opinion of the majority is distinguished from other operational negligence cases. How ironical it is that prior to the 1970 term, the *Usner* judgment denying recovery would have been reversed probably out of hand, as Mr. Justice Douglas pointed out in the dissenting opinion. This should have been the decision on January 25th,

1971, if prior decisions of this Court mean anything at all.

It is interesting to note the division of the Court in this case as to their respective dates of appointment and time of service on this Honorable Court.

The four Justices who dissented are:

Mr. Justice Hugo L. Black, August 19, 1937,

Mr. Justice William O. Douglas, April 17, 1939,

Mr. Justice John M. Harlan, March 28, 1955,

Mr. Justice William J. Brennan, October 16, 1956.

The five Justices who composed the majority and the respective dates on which they took office are as follows:

Mr. Justice Potter Stewart, October 14, 1958,

Mr. Justice Byron R. White, April 16, 1962,

Mr. Justice Thurgood Marshall, October 2, 1967,

Chief Justice Warren E. Burger, June 23, 1969,

Mr. Justice Harry R. Blackmun, June 9, 1970.

It is of paramount significance to examine the composition of the *Mascuilli* Court and the *Usner* Court to determine what this Court decided in *Mascuilli*.

The *Mascuilli* Court was composed of the following:

Chief Justice Earl Warren, retired June 23, 1969,

Mr. Justice Tom C. Clark, retired June 12, 1967,

Mr. Justice Abe Fortas, retired May 12, 1969,

all of whom concurred in the granting of the writ in *Mascuilli*, and,

Mr. Justice Hugo L. Black,

Mr. Justice William O. Douglas,

Mr. Justice William J. Brennan, Jr., who also concurred in the granting of the writ and,

Mr. Justice John M. Harlan,

Mr. Justice Potter Stewart,

Mr. Justice Byron R. White,

who dissented from the granting of the writ.

The members of the Court which decided *Usner* are as follows:

Chief Justice Warren E. Burger,

Mr. Justice Hugo L. Black,

Mr. Justice William O. Douglas,

Mr. Justice John M. Harlan,

Mr. Justice William J. Brennan, Jr.,

Mr. Justice Potter Stewart,

Mr. Justice Byron R. White,

Mr. Justice Thurgood Marshall,

Mr. Justice Harry R. Blackmun.

The majority in *Usner* was composed of two dissenters (Justices Stewart and White), from the granting of the writ in *Mascuilli*, and three post-*Mascuilli* Justices (Chief Justice Burger, Justice Blackmun and Justice Marshall, who was the Solicitor General and counsel for the United States of America in the *Mascuilli* case).

Though the majority states that petitioner's reliance on *Mascuilli* is misplaced, it is submitted that the *Mascuilli* Court decided the second issue presented to it affirmatively, that is, that the negligent handling of proper equipment by a longshoreman creates a dangerous condition rendering the vessel unseaworthy.

It is submitted that one must look to the dissenters in *Usner* (Justices Black, Douglas, Brennan and Harlan), who were all members of the *Mascuilli* Court for the answer as to which issue was affirmatively decided.

Though Justice Harlan dissented from the granting of the *Mascuilli* writ, he leaves no doubt in his dissenting opinion in *Usner* that *Crumady* decided the issue presented in *Usner* and that it was cited in *Mascuilli* in support of the Court's affirmative answer to the second question presented.

Mr. Justice Stewart, who dissented in granting writs in *Mascuilli*, attempts to explain what the Supreme Court meant in its Per Curiam decision in *Mascuilli* Footnote 19, Page 6 of the opinion. He states that peti-

tioner's reliance upon *Mascuilli* is misplaced. He points out that the petition for certiorari posed three questions:

"1. Did a prior unseaworthy condition come into play by the tightline condition?

2. Did the negligent handling of proper equipment by the longshoremen create a dangerous condition rendering the vessel unseaworthy?

3. Was the vessel unseaworthy because the longshoremen were 'not equal in disposition and seamanship to the ordinary men in the calling', as was found in *Boudoin vs. Lykes Brothers*, 348 U.S. 336 (1955)?"

He further states, and we quote, "Our Per Curiam reversal cited two cases: *Mahnich vs. Southern S. S. Co.*, 321 U.S. 96, and *Crumady vs. The J. H. Fisser*, 358 U.S. 423. *Mahnich* involved a defective rope, *Crumady* a defective winch. It seems evident therefore, that it was the first question posed by the petition for certiorari to which the Court gave an affirmative answer."

This interpretation of the *Mascuilli* decision by Mr. Justice Stewart is contrary to the interpretation given to it by Mr. Justice William O. Douglas, and the dissenters in *Usner*, who were in the majority granting the writ and rendering the decision. Mr. Justice Douglas states his interpretation of *Mascuilli* as follows:

"In *Mascuilli vs. U.S.*, 387 U.S. 237, negligent use of a winch in a loading operation so obviously made the vessel *pro tanto* unseaworthy that we reversed out of hand a judgment of no liability citing *Mahnich* and *Crumady*." Page 2 of the dissenting opinion.

Mr. Justice Douglas, in his dissent, pointed out on page 1, "In *Mahnich*, the staging from which the seaman fell was an unseaworthy appliance because of the defective rope with which it was rigged. There was sound rope on board, but defective rope was used. The fact that the mate and boatswain were negligent in selecting defective rope was held to be no defense."

Mr. Justice Douglas, in his dissent, further points out in *Crumady*, ". . . a winch was not inherently defective as was the rope in *Mahnich*. But it was used in a way which made it unsafe and dangerous for the work at hand. While the rigging would take only three tons of stress, the cutoff of the winch, 'its safety device, was set at twice that limit Id., at 427. And so the rope sling broke and injured the seaman. The vessel which paid the damages was allowed to recover over from the stevedores whose negligence with the winch made the vessel *pro tanto* unseaworthy."

We submit that Mr. Justice Douglas' interpretation of the holding in *Mahnich* and *Crumady* is correct and that *Mascuilli* answered the second question posed.

## CONCLUSION

In conclusion, it is submitted that the majority opinion overlooked the basis of petitioner's complaint. The complaint in the present case asserts a cause of action based upon the unseaworthiness of the vessel.

Petitioner's complaint is not based upon the negligence of the winch operator. It is irrelevant and immaterial that the condition of unseaworthiness was due to the negligent act of the winch operator.

For the foregoing reasons, it is respectfully urged that

the petition for re-hearing be granted and that upon further consideration, the judgment of this Honorable Court rendered on January 25, 1971, be set aside and a decision entered, reversing the Judgment of the Court of Appeals for the Fifth Circuit and granting petitioner relief as prayed for.

Respectfully submitted,

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## CERTIFICATE

I, H. Alva Brumfield, counsel for the above-named Petitioner, do hereby certify that the above and foregoing Petition for Re-hearing is presented in good faith and not for delay.

I further certify that a copy of the above Petition for Re-hearing was mailed to Charles Kohlmeyer, counsel for Respondent, at 1800 NBC Building, New Orleans, Louisiana, 70112.

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H. ALVA BRUMFIELD